Supreme Court, U.S.
FILED
APR 28 1960
JAMES R. BROWNING, Clerk

IN THE

Supreme Court of the United States

October Term, 1959

No. 751

SARAH HUNTER KELLY,

Petitioner,

v.

THE UNITED STATES

PETITIONER'S BRIEF IN REPLY

GUSTAVE I. JAHR,
Attorney for Petitioner,
10 East 43rd Street,
New York 17, N. Y.

LODER APPEAL PRESS, INC., 65 Duane Street, N. Y. C. WORTH 2-0689

BLEED THROUGH POOR COPY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

No. 751

SARAH HUNTER KELLY,

Petitioner,

v.

THE UNITED STATES

PETITIONER'S BRIEF IN REPLY

The Government in its opposing brief has posed two questions, to which petitioner herewith replies:

AS TO QUESTION #1. The determination of the Court below that Mrs. Kelly's property was taken by French authorities under the laws of France, and not by the United States, is *not* sustained by the valid evidence, which is set forth in paragraphs 1-31, pp. 3-15, of the Petition for Writ of Certiorari.

The finding of the Court of Claims was erroneous, for the following reasons:

(a) SOP No. 10F (Def. Exh. 1, 2, 10), heavily relied upon by the Court below, did not authorize the Army, in violation of the Constitution, to demand that property of American citizens be taken by France and furnished to our Army as reverse lend-lease, without American

responsibility to the American owner for fair compensation. Nor did Congress intend in the Lend-Lease Act to confer this authority. The Court is referred to Questions 2 and 3, pp. 2, 17-20, of Petition for the Writ.

(b) The Court below also relied heavily upon the letter agreement of August 25, 1944 (Def. Exh. 6), sent by "Dwight D. Eisenhower, *General, United States Army, Commanding General, U. S. Army Forces, European Theater of Operations*" to General Koenig, Chief of the French Military Mission, to which were attached four "unsigned" memoranda concerning arrangements. (At the top of page 5, the Government mistakenly refers to said letter as "the executive agreement of August 25, 1944, whereby the *Provisional Government of the Republic of France* agreed upon request of the *Supreme Allied Commander*, etc."—which is misleading as to the titles of the parties who signed and received said letter.) In signing said letter, General Eisenhower acted in his capacity as Commanding General of the U. S. Forces, and as such was sworn to uphold the Constitution. For said reason, in addition to the other reasons set out in Questions 1 and 4, pp. 2, 15-17, 20-23 of Petition for the Writ, said letter and attached four memoranda must be deemed null and void to the extent that the Constitutional property rights of an American citizen are violated therein.

(c) The instructions issued by the French General Bookkeeping Department, referred to by the Commissioner as "Aid to Allied Forces, General Instruction No. 1" (Def. Exh. 4, 5) cannot affect adversely the Constitutional relationship existing between the United States and an American citizen.

(d) Nor can Forms No. 101 and 102, the "Demand" and "Receipt", issued by the French, affect adversely said Constitutional relationship.

BLEED THROUGH POOR COPY

(e) Furthermore, said "Demand", dated February 27, 1945, was served upon the French Mayor only four months after occupation of petitioner's property by the U. S. Forces (Pltf's Ex. 11). That a prior demand was made is conjecture or hearsay. Mrs. Kelly will prove that the French Mayor was in her employ as her caretaker in charge of her property, and furnished her with the Demand (Pltf's Ex. 11) served upon him.

The Government's statement at page 2 that "in 1944 the property again was taken by French authorities under the laws of France and turned over to the American Army" is mistaken and contrary to the evidence (Pltf's Exh. 13). The Government's statement at pp. 5-6 that "*before* occupying petitioner's premises on October 17, 1944, the Army formally requested, by means of a Form No. 101, that French Authorities make petitioner's chateau available for Allied use" is also mistaken and contrary to the evidence (Pltf's Exh. 11).

(f) The Court below erred in finding "There is no evidence of any authority under which United States Forces might have acted in occupying the premises other than SOP No. 10F, etc." It is well established that the plenary war powers vested in Congress under the Federal Constitution and the principal war powers of the President arising from his position as Commander in Chief of the Army and Navy vested in him by the Constitution and delegation of authority by him to the various departments, amply authorize the requisition of property of an American citizen by the U. S. Forces in war-time. *Mitchell* v. *Harmony, N. Y.*, 13 How. 115, 14 L. Ed. 75. Furthermore, the report of the Government herein (Pltf's Exh. 13) expressly admitted:

> "* * * we have ascertained the following: The property of Mrs. Kelly was requisitioned by the

> U. S. Army from 17 October 1944 until 22 August 1945. Prior to the requisition of the property, a survey was made by competent authorities consisting of French and U. S. Government representatives."

Since this is the Government's own admission, it is not objected to as are other hearsay statements contained in said report.

As to Question #2. Petitioner's claim is *not* barred by the six-year Statute of Limitations, for the acknowledgment of the debt (i.e. the executory accord) by the French, who acted as the duly appointed agent or representative of the United States, and the part payments made thereunder by the French, imputed to the United States as principal, tolled the Statute of Limitations. The administrative procedure of settling the petitioner's claim was completed on entering into the accord in 1951. The Court is referred to the cases cited by petitioner in support of the law of agency and tolling of the statute, in her Petition for the Writ, footnote at page 8. The cases cited by the Government are not in point.

The theory of accord and satisfaction is stated in Restatement of Contracts, Ch. 13, par. 417, page 785, pars. a) to d), from which it will be seen that plaintiff could not enforce the accord until breached, and in fact would have been subject to a counterclaim for damages had she done so. The last partial payment was made on June 21, 1951. The plaintiff could not, on August 25, 1951, have anticipated a breach, when the Government alleges that the statute expired. The statute perforce was tolled as of June 21, 1951. The Court is referred to Petition for the Writ, paragraphs 14-17, pp. 7-8.

It is respectfully submitted that, after the expiration of the Statute of Limitations, the Government may not

BLEED THROUGH POOR COPY

repudiate with impunity representations and directions made in writing and orally by the duly constituted authorities to the petitioner, upon which she relied and acted in good faith—to her detriment and irreparable damage. Petitioner has set forth the law involved (page 23, par. 5, and footnote), viz.: that the Government may not even innocently mislead a citizen and then claim the benefit of its deception. The cases cited by the Government are not applicable.

It will be noted that the Government has remained aloof and was not impelled to make any comment on petitioner's "Reasons for Granting the Writ," except to state at page 6, in response to petitioner's challenge of the Army's authority to ask the French to furnish American property to the U. S. Forces as reverse lend-lease, without payment of fair compensation, that "if SOP No. 10F were invalid, the Army then acted without authority in requesting the French officials to requisition the chateau" and "in such circumstances petitioner's only claim would be one sounding in tort." This argument is spurious, for as we have shown, in paragraph (f) *supra*, in war-time the U. S. Army has the right to requisition private property needed for war purposes. It is stated in 93 C. J. S., p. 48, Sec. 22f, that "any order or directive which requires the owner to turn over his property, under compulsion or duress, constitutes a taking or requisition."

It has been distressing to behold the attempts of the Government to deprive Mrs. Kelly of the balance of fair compensation due her for the damage to her chateau caused by the 80,000 American servicemen who occupied it for a weekly period, used as a U. S. Replacement Center. In all equity she is entitled to fair compensation.

It was well said by Mr. Jefferson:

> "In questions of power, let no more be said of confidence in man, but bind him down from mischief by the chains of the Constitution."

It is respectfully requested that the petition for a writ of certiorari be granted.

Respectfully submitted,

GUSTAVE I. JAHR,
Attorney for Petitioner.